

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

ReliaSource

Appellant,

RE: KNEWEDS, Inc. d/b/a Consulting
Services, Inc.

Appealed From
Size Determination No. 05-2014-011

SBA No. SIZ-5536

Decided: February 20, 2014

APPEARANCE

John R. Tolle, Esq., Barton Baker Thomas & Tolle, LLP, McLean, Virginia, for
Appellant

DECISION

I. Introduction and Jurisdiction

On December 3, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2014-011 dismissing a size protest filed by ReliaSource (Appellant). The Area Office concluded that Appellant's protest was untimely.

Appellant contends that its protest was improperly dismissed, and requests that the matter be remanded for a new size determination. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. The record reflects that the size determination was issued December 3, 2013, but not received by Appellant until December 5, 2013. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFQ and Protest

On May 29, 2013, the U.S. Department of Homeland Security, U.S. Secret Service (Secret Service) issued Request for Quotations (RFQ) No. HSSS01-13-R-0029 for mainframe support services, hardware/software support services, and ancillary technical support. (RFQ at 1.) The RFQ stated that the Secret Service planned to award a task order through the 8(a) STARS II Government-wide Acquisition Contract (GWAC). The Contracting Officer (CO) set aside the procurement entirely for participants in the U.S. Small Business Administration (SBA) 8(a) Business Development (BD) program, and assigned North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, with a corresponding size standard of \$25.5 million average annual receipts.

On November 22, 2013, the CO announced that KNEWBS, Inc. d/b/a Consulting Services, Inc. (CSI) was the apparent awardee. The CO further stated that “[n]o response [to the award notification] is required unless a basis exists to challenge the small business size status of the apparently successful offeror.” On November 27, 2013, Appellant, an unsuccessful offeror, filed a size protest alleging that CSI is not a small business concern for the task order at issue. The CO forwarded Appellant's protest to the Area Office for review. In subsequent correspondence, the Secret Service advised the Area Office that the RFQ “did not request size recertification at the order level.” (E-mail from Andrew Baker to Stephanie Lewis (December 2, 2013).)

B. Size Determination

On December 3, 2013, the Area Office issued Size Determination No. 05-2014-011 dismissing Appellant's protest as untimely. The Area Office explained that the 8(a) STARS II GWAC is a long-term contract with a five-year base period and one five-year option. (Size Determination at 1.) As a result, “CSI's size is determined as of the date it self-certified as small for the [8(a)] STARS II” contract, unless recertification was required in conjunction with a particular task order. (*Id.* citing 13 C.F.R. §§ 121.404 and 121.1004 and *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010).) The Area Office found that the RFQ here did not “did not specifically and explicitly require size recertification.” (*Id.*) Furthermore, it is too late for Appellant to protest the award of an 8(a) STARS II contract to CSI. The Area Office determined that CSI was identified as one of several 8(a) STARS II awardees in a FedBizOpps notice published August 2, 2011. (*Id.* at 1.) Any size protest against that award would have been due within five business days of the notice, so Appellant's protest, filed approximately two years later, is untimely. (*Id.* at 2.)

C. Appeal

On December 19, 2013, Appellant filed the instant appeal. Appellant insists that the Area Office clearly erred in dismissing Appellant's protest.

Appellant contends that the RFQ did require a size recertification. (Appeal at 3.) Appellant emphasizes that the procurement was set aside exclusively for 8(a) BD participants, which, in Appellant's view, is "consistent with a recertification requirement." (*Id.* at 5.) Additionally, the RFQ incorporated by reference various clauses from the Federal Acquisition Regulation (FAR), including 52.212-1, 52.212-3, 52.212-4, and 52.212-5. Appellant asserts that these clauses "clearly require offerors to recertify their size at the time they submit their proposal in response to the solicitation." (*Id.*) Appellant also points to the fact that the CO, in announcing the planned award to CSI, stated that "[n]o response is required unless a basis exists to challenge the small business size status of the apparently successful offeror." According to Appellant, this statement demonstrates that recertification was required and size protests were permissible. (*Id.* at 8.)

Appellant asserts that the Area Office erroneously relied upon *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177 (2010) in dismissing Appellant's protest. Appellant contends that the more relevant precedent is *Size Appeal of Professional Project Services, Inc.*, SBA No. SIZ-5411 (2012). (*Id.* at 9.) Appellant observes that, as discussed in *Professional Project Services*, the Small Business Act was amended in 2010 to state that certification is deemed to have occurred when a concern chooses to submit a proposal for a small business set-aside. (*Id.* at 11, referencing 15 U.S.C. § 632(w)(2).)

Appellant asserts that *Safety and Ecology* is factually distinguishable from the instant case and should not have been followed. Appellant maintains that procuring agencies have discretion to require recertification for individual task orders, and further argues that "recertification is required in procurements with the same or similar facts as here." (*Id.* at 15.) Appellant contends that once a solicitation is set-aside for small business concerns, SBA "has sole authority in determining size status." (*Id.* at 16.) Consequently, when a procuring agency issues a task order intended for small businesses, an offeror "renews its certification that it is small by submitting a response to the solicitation," so the appropriate date for determining size is the date of the proposal for the task order. (*Id.* at 17-18.)

Neither the Secret Service nor CIL responded to the appeal.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

SBA regulations stipulate that "[a] concern that qualified as a small business at the time it

receives a contract is considered a small business throughout the life of that contract.” 13 C.F.R. § 121.404(g). As a result, SBA will not entertain a size protest against the award of an order under a GWAC or other long term contract, unless the procuring agency requested recertification in conjunction with that order. *Id.* § 121.1004(a)(3)(iii). OHA has repeatedly recognized that “size protests may only be filed against task orders issued under long term contracts if the contracting officer requests size recertification for that task order.” *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323, at 3 (2012); *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011)(PFR).

In the instant case, there is no dispute that the 8(a) STARS II GWAC is a ““long-term contract” within the meaning of SBA regulations. Furthermore, CSI was awarded its GWAC contract in 2011, and there was no timely size protest of that award. Accordingly, the key issue presented here is whether the instant RFQ required recertification. If not, Appellant's protest was improper and the appeal must be denied.

Appellant maintains that the RFQ did request recertification because the Secret Service restricted the procurement to 8(a) BD participants, and incorporated various standard FAR clauses. *See* Section II.C, *supra*. These contentions fail for several reasons. OHA has specifically rejected the notion that “merely setting [a] task order aside for small businesses is a request for recertification,” and likewise has found that recertification does not occur simply because mandatory FAR clauses were incorporated. *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 21 (2010). The FAR clauses Appellant references may require that an offeror be a small business on its underlying GWAC contract, but do not indicate that an offeror must recertify its size for each individual task order. Further, the procuring agency in this case advised the Area Office that recertification was not required for the RFQ, and Appellant points to no specific statements in the RFQ indicating that recertification was required. This case therefore contrasts sharply with OHA precedent such as *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013), where OHA determined that recertification was required based on the language of the task order solicitation.

Appellant also argues that the CO authorized size protests against CSI, because the award notification stated that “[n]o response is required unless a basis exists to challenge the small business size status of the apparently successful offeror.” *See* Section II.A, *supra*. The size protest process, however, is governed by SBA regulations, and guidance or actions by a procuring agency cannot override or alter those regulations. *E.g.*, *Size Appeal of HAL-PE Assocs. Eng'g Servs., Inc.*, SBA No. SIZ-5478 (2013) (procuring agency's issuance of a corrected award notice did not extend the time period for filing a size protest, notwithstanding that the corrected notice stated that size protests were due five days after issuance of the corrected notice). Accordingly, the CO could not authorize a size protest against CSI if not otherwise permitted by SBA regulations.

Appellant also observes that, in *Professional Project Services*, OHA noted that the Small Business Act was amended in 2010 such that a certification is deemed to have occurred when a concern chooses to submit a proposal for a set-aside procurement. *Professional Project Services, Inc.*, SBA No. SIZ-5411, at n.5 (citing 15 U.S.C. § 632(w)(2)). The amended statute does not, however, refer to orders, and OHA has determined that 15 U.S.C. § 632(w)(2) applies only to

contracts and the other types of instruments specifically identified in the statute, not to task orders. *Size Appeal of TISTA Science and Technology Corp.*, SBA No. SIZ-5529 (2014). As a result, CSI is not deemed to have recertified by submitting a proposal for this RFQ.

IV. Conclusion

Because the instant RFQ did not require recertification, the Area Office correctly dismissed Appellant's protest. The appeal is therefore DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge